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No. 03-1164

IN THE

Supreme Court of the United States

ANN VENEMAN, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF 48 CATTLE AND AGRICULTURAL ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CHARLES L. BABCOCK *
DAVID T. MORAN
WILLIAM D. ELLERMAN
JACKSON WALKER L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202
(214) 953-6000

* Counsel of Record

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

The 48 *amici curiae*, which are listed at the end of the enclosed brief, respectfully seek leave of this Court pursuant to Supreme Court Rule 37.2(b) to file the enclosed brief in support of the Petition for Writ of Certiorari filed in *Ann Veneman, Secretary, United States Department of Agriculture, et. al. v. Livestock Marketing Association, et. al.*, No. 03-1164, as well as the Petition for Writ of Certiorari filed in *Nebraska Cattlemen, Inc., et. al. v. Livestock Marketing Association, et. al.*, No. 03-1165.

Pursuant to Supreme Court Rule 37.2(a), the *amici curiae* have requested consent to the filing of the enclosed brief from all of the petitioners and respondents in this proceeding. All of the petitioners have consented to the filing of the enclosed

brief. The respondents have refused to consent to the filing of the brief.[1] Accordingly, this matter is presented to the Court for determination.

The 48 *amici curiae* are organizations that represent American cattlemen and women, farmers, members of the beef industry, and others involved in various agricultural pursuits across the United States (the *amici curiae* are hereafter referred to as the Associations). This case arises from an opinion of the Eighth Circuit Court of Appeals, which struck down the Beef Act (7 U.S.C. § 2901 *et seq.*) on First Amendment grounds. The Associations have significant interests in the outcome of this case because many of the thousands of individuals represented by the Associations directly benefit from the Beef Act and the accompanying Beef Checkoff program. These individuals have seen a dramatic increase in beef sales and demand due to generic advertising under the Beef Act, and they have benefited from the important research, consumer information, and educational projects funded by the Beef Checkoff. Moreover, in addition to the cattle industry, a number of the Associations represent individuals in other agricultural pursuits who benefit from similar legislation which may be impacted by the Eighth Circuit's opinion.

The Associations are concerned about the Eighth Circuit's opinion and the devastating effect it may have on members of the Associations, including American cattlemen. From their positions on the front lines of farming, cattle raising, beef production, and similar pursuits, the Associations can offer the Court a unique perspective on the issues presented in this case, and they can submit relevant information concerning the positive effects the Beef Act and similar acts have had upon the cattle industry, American agriculture, and the economy as a whole. Conversely, they can also discuss the negative impact that the Eighth Circuit's opinion will have upon the Associations' members.

One of the central issues presented in this case is whether generic advertising under the Beef Act constitutes government speech. One of the most important factors for determining whether the advertising constitutes government speech is whether it is "explicitly for the furtherance of federal government goals." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). The Associations have witnessed first hand the positive effects that government speech, as authorized by the Beef Act, has had upon their members, and they can confirm that Congress' goals in enacting the Beef Act have indeed been met. Accordingly, the Associations respectfully request that the Court grant this Motion, and consider the matters contained in the enclosed brief.

Respectfully submitted,

CHARLES L. BABCOCK *
DAVID T. MORAN
WILLIAM D. ELLERMAN
JACKSON WALKER L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202
(214) 953-6000

* Counsel of Record

Counsel for Amici Curiae

[1] The respondents are: Livestock Marketing Association, Western Organization of Resource Councils, Robert M. Thullner, John L. Smith, Ernie J. Mertz, John Willis, Pat Goggins, Herman Schumacher, Jerry Goebel, and Leo Zentner.

QUESTIONS PRESENTED

1. Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. § 2901 *et seq.*, and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

2. Whether the district court erred in issuing a nationwide injunction against the collection of all assessments under the Beef Act, including those from cattle producers who support the generic advertising and those used to fund activities other than generic advertising.

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BRIEF OF 48 CATTLE AND AGRICULTURAL ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*[1]

Pursuant to Supreme Court Rule 37.2, the 48 *amici curiae* listed at the end of this brief *amici curiae* submit this brief in support of the Petitions for Writ of Certiorari filed in *Ann Veneman, Secretary, United States Department of Agriculture, et. al. v. Livestock Marketing Association, et. al.*, No.

[1] In accordance with Rule 37.6, it is stated that this brief was not authored, in whole or in part, by counsel for a party. No persons or entities, other than the *amici*, contributed monetarily to the preparation and submission of this brief.

03-1164, and *Nebraska Cattlemen, Inc., et. al. v. Livestock Marketing Association, et. al.*, No. 03-1165.

The 48 *amici curiae* participating in this brief consist of organizations from numerous states that are involved in all aspects of the cattle industry, entities generally involved in the promotion of agricultural concerns, and entities involved in other agricultural industries that may be effected by the Eighth Circuit's opinion. (the *amici curiae* are hereafter collectively referred to as the "Associations"). Members of the Associations include American cattlemen and women, ranchers, farmers, and others involved in various agricultural pursuits throughout the United States. Many of the members of the Associations directly benefit from the promotional, research, and educational activities conducted by the government pursuant to the Beef Promotion and Research Act of 1985 (7 U.S.C. § 2901 *et seq.*, referred to hereafter as the "Beef Act").

The Eighth Circuit Court of Appeals' opinion in *Livestock Mktg. Ass'n v. USDA,* 335 F.3d 711 (8th Cir. 2003), causes great concern to the Associations about the devastating effect the opinion will have on the cattle industry—one of the oldest, largest, and most important components of America's agricultural economy.[2] Among other things, the opinion threatens to stall and reverse the steady increase in beef sales and demand that has been fostered by the Beef Act and the Beef Checkoff program. This may ultimately resume the decline of the cattle industry that prompted the Beef Act in the first place. *See, e.g.*, Committee Report, Beef Research and Information Act, H.R. Rep. No. 452, 94th Cong., lst Sess. 3; 121 Cong. Rec. H31439 (1975) (stating that continuation of the downward trend in the cattle industry "would endanger not only the country's meat supply, but the entire economy").

[2] The opinion also threatens other agricultural industries other than the beef industry, as evidenced by the participation of certain Associations in this brief.

Because the Associations and their members are intimately involved in and familiar with the beef industry and similar industries, they will undoubtedly feel the effects of the Eighth Circuit's holding that the Beef Act contravenes the First Amendment. As Congress stated in the Beef Act's preamble, "the production of beef and beef products plays a significant role in the Nation's economy." 7 U.S.C. § 2901(a)(2). The Associations have seen first hand the positive effect the Beef Act has had upon the cattle industry and the economy as a whole due to the promotion of the beef industry through permissible avenues of government speech. Accordingly, the Associations fully support the Petitions for Writs of Certiorari filed in this matter, and respectfully urge the Court to review the decision of the Eighth Circuit Court of Appeals.

SUMMARY OF THE ARGUMENT

Not only does this case present the Court with issues of undeniable national importance—it also raises First Amendment issues which the Court has never had the opportunity to resolve. Although the Court has, on two recent occasions, addressed the constitutionality of assessments used to fund commodity-marketing programs, neither case raised the question of whether such advertising falls within the protections of the "government speech" doctrine. That is the precise question raised in this case, and its importance to this case and many others warrants this Court's exercise of its jurisdiction.

In the underlying opinion, the Eighth Circuit created a broad and unfounded rule that the government speech doctrine cannot apply when a case arises from a challenge directed to the compelled funding of speech, rather than to the government's choices regarding the content of its speech. In addition to having no foundation in this Court's First Amendment jurisprudence, this ruling squarely conflicts with decisions of two other circuits, as well as a federal district court, concerning the very same act of Congress. The proliferation of

litigation challenging the Beef Act and similar commodity marketing acts, and the recurring confusion over application of the government speech doctrine to those acts, illustrate the need for guidance and clarification from this Court.

The Eighth Circuit also incorrectly applied this Court's test for commercial speech articulated in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). In holding that advertising conducted pursuant to the Beef Act did not pass muster under *Central Hudson*, the court directly contradicted a prior holding by the Third Circuit Court of Appeals. Accordingly, the Court should grant certiorari in order to resolve that circuit-split.

Finally, the Eighth Circuit improperly affirmed the evisceration of the entire Beef Act. Under this Court's precedents, the court should have limited application of its ruling to the underlying plaintiffs. However, the court's nationwide injunction deprives thousands of non-objecting parties, including many of the Associations and their members, from continuing to reap the benefits that the Beef Act has undisputedly provided them. Moreover, the court's remedy inexplicably halted important research, consumer information, and educational activities conducted under the Beef Act, including research designed to protect Americans from serious health concerns. These are matters requiring the Court's attention.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S RULING CONFLICTS WITH OPINIONS OF THIS COURT AND OTHER COURTS ON RECURRING ISSUES IMPLICATING THE "GOVERNMENT SPEECH" DOCTRINE.

This case presents a constitutional challenge to a generic advertising campaign launched pursuant to the Beef Act. The campaign, which brought us the famous "Beef. It's What's for Dinner" slogan, is funded by America's beef producers

pursuant to the Beef Checkoff, and disseminated under the direct supervision and control of the United States Department of Agriculture. In addition to advertising, funds raised by the Beef Checkoff program are used in, among other things, research activities designed to ensure that U.S. beef remains the safest in the world. *See generally http://www.bseinfo.org* (last visited Apr. 14, 2004) (providing health information funded, in part, by the Beef Checkoff). The importance of this aspect of the Beef Act cannot be emphasized enough, given the public's heightened awareness of issues such as bovine spongiform encephalopathy ("BSE"), more commonly referred to as "mad cow disease." The continued strong consumer confidence and beef demand in light of these concerns is a testament to the Act's success and importance to the cattle industry, and is but one of many reasons the Associations consider the Beef Act to be necessary in order for the industry to thrive.

In the underlying opinion, the Eighth Circuit struck down the Beef Act, the Beef Order, the Beef Checkoff, and all advertising and research activities conducted pursuant to the Act, as violative of the First Amendment. Invalidating a long-standing and undeniably important act of Congress is, in and of itself, sufficient to merit review by this Court. *See United States v. Bajakajian*, 524 U.S. 321, 327 (1998) (stating that review was granted because the court of appeals struck down an act of Congress); Robert L. Stern *et al.*, *Supreme Court Practice* 436 (8th ed. 2002). Nevertheless, certiorari is warranted for several additional reasons, the most notable of which is that this case involves important issues regarding the "government speech" doctrine which, as the underlying opinion noted, has never been specifically addressed by the Court "in a case involving an agricultural checkoff program." *Livestock Mktg. Ass'n*, 335 F.3d at 717. This case presents not only an issue of national importance, but also the perfect opportunity for the Court to clarify this aspect of the law, and put an end to the increasingly recurrent confusion in the lower

courts as to whether the type of speech at issue here falls outside of the First Amendment.

A. The Court Should Address, For The First Time, The Government Speech Issue In The Context Of Mandatory Assessments For The Promotion of Agricultural Products.

The First Amendment's freedom of speech guarantee limits the government's right to interfere with private speech, but it does not prevent the government from engaging in its own speech. This Court has held that when the government speaks, "it may make content-based choices . . . [and] it is entitled to say what it wishes." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995). Engaging in speech is necessary in order to address issues of importance to the nation, and is "but one means that government must have at its disposal to conduct its affairs and to accomplish its ends." Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2001). As long as the government bases its speech on legitimate goals, it may do so without implicating First Amendment concerns. *Keller v. State Bar of California*, 496 U.S. 1, 10 (1990). This Court has also held that the government may fund speech in support of its policies through "taxes or other exactions binding on protesting parties." *Board of Regents v. Southworth*, 529 U.S. 217, 229 (2000). Through its opinion, the Eighth Circuit has called this fundamental aspect of First Amendment jurisprudence into question, and it has cast considerable doubt upon the government's ability to take positions on important topics of national concern. Put simply, if the government is not afforded the right to speak, then it cannot effectively govern. *Keller*, 496 U.S. at 12-13 (stating that without government speech, "the process of government as we know it would be radically transformed").

This Court has *never* addressed the issue of whether the government speech doctrine applies to mandatory assessments used to fund programs such as the Beef Act. As an example of the urgent need for resolution of the government speech issues presented here, shortly after the Petitions in this matter were filed, and less than three weeks before the submission of this brief, the Fifth Circuit Court of Appeals lamented that this Court has not yet addressed whether the government speech doctrine applies to commodity marketing programs.[3] *Pelts & Skins, LLC v. Landreneau*, No. 03-30523, 2004 WL 725275, *4, n.12 (5th Cir. Apr. 2, 2004). Although the Fifth Circuit ultimately held that the particular marketing

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[3] *Pelts & Skins* held unconstitutional a Louisiana act that allowed generic marketing of alligator products, funded by assessments from hunters. The legislation at issue in that case was held not to constitute government speech because the government had no control over the speech. In this case, however, the government unquestionably disseminates all advertising and speech conducted under the authority of the Beef Act. For instance, members of the Beef Board and Beef Committee are under the direct control of the Secretary of Agriculture. *See* 7 U.S.C. § 2904(1); 7 C.F.R. § 1260.141(b); 7 C.F.R. § 1260.212. All budgets, plans or projects approved by the Board must receive final approval from the Secretary. *See* 7 U.S.C. § 2904(4)(C). The Secretary has the final authority to approve or reject the contents of all projects suggested by the Beef Board. (Trial Transcript at 141-42). A Department of Agriculture representative attends every meeting of the Beef Board, the Operating Committee, and the Executive Committee. (Trial Transcript at 205, 215). The Beef Board is required to submit audits of its activities to the Secretary each fiscal period. 7 C.F.R. § 1260.150(a). If the Secretary determines that a proposed checkoff-funded project does not serve the purposes of the Beef Act, the project will not move forward. (Trial Transcript at 192, 312-13). Clearly, as contrasted with the facts of *Pelts & Skins*, the United States government controls all speech communicated pursuant to the Beef Act and, as this Court has held, the fact that the messages might actually be delivered by private individuals is of no consequence to a government speech analysis. *Rosenberger*, 515 U.S. at 833 (holding that the government may communicate through private entities or individuals).

at issue in that case did not constitute government speech, the court opined that "[t]he Supreme Court's treatment of compelled subsidy challenges convinces us that the government speech doctrine is *at least potentially applicable* to this general category of cases." *Id.* at *4, n.13 (emphasis added). Obviously, the Fifth Circuit struggled with the issue of whether the government speech doctrine applied to the case under review. That is because, until now, this Court has not yet had the opportunity to address this precise issue.

As the Petitions on file in this matter so aptly demonstrate, the Court has in recent years addressed the constitutionality of two agricultural marketing programs, yet it was not able to analyze those programs in the context of a government speech argument. First, in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), the Court held that mandatory assessments that were used to advertise California tree fruit passed Constitutional muster. Among other things, the Court concluded that the generic advertising at issue in that case was germane to the purposes of the legislation requiring the assessments, and the assessments funded generic advertising, rather than ideological viewpoints. *Id.* at 473. Much like the central message of "Beef. It's What's for Dinner," none of the advertising at issue in *Wileman* "promotes any particular message other than encouraging consumers to buy California tree fruit." *Id.* at 472. Although the Court upheld the constitutionality of the legislation in *Wileman*, that case did not present the question of whether the advertisements at issue constituted government speech.

Four years later, the Court decided *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). In that case, the Court reviewed the constitutionality of the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq*. The Court ultimately held that, among other things, compelled support for mushroom advertising was not part of a larger regulatory scheme, as was the case in *Wileman*. *Id.* at 412-13. However, once again, the Court was

unable to analyze the question of whether the advertising in that case was immune from First Amendment scrutiny under the government speech doctrine. Because the petitioner in *United Foods* failed to properly raise the issue, the Court declined to consider whether the advertising constituted government speech, thus leaving the question open for determination at a later date. *Id.* at 417. That is the question presented now.

The fact that this significant issue has never been addressed by the Court demonstrates that this case is ripe for review. Moreover, there is much confusion and disagreement among the lower courts as to the applicability of the government speech doctrine to commodity marketing programs. If the government speech question continues to go unanswered, the swarm of lawsuits challenging similar legislation will only increase, and the uncertainty will continue to threaten the livelihood of members of the Associations, as well as others involved in similar pursuits.

B. The Court Should Grant Certiorari In Order To Resolve Splits Among The Circuits Regarding Applicability Of The Government Speech Doctrine.

Because of the uncertainty about whether the government speech doctrine applies to agricultural marketing programs, lower courts are in a state of chaos regarding the constitutionality of such programs. Several years before the Court's opinions in *Wileman* and *United Foods*, the Third Circuit Court of Appeals was faced with the first challenge to the Beef Act in *United States v. Frame*, 885 F.2d 1119, 1133 (3d Cir. 1989). In *Frame*, although the court ultimately concluded that the Beef Act was constitutional, it held that the government speech doctrine was not applicable to the program. However, the court did acknowledge that the issue of whether the Beef Checkoff compelled government, rather than private, speech was a "close one," and that there were

"sound reasons for concluding that the expressive activities financed by the Beef Promotion Act constitute 'government speech." *Id.* at 1131-1132. The court acknowledged the close nexus between the Beef Board and the Department of Agriculture, and recognized that when "the Board or Committee 'speaks,' they do so on behalf of the Secretary of Agriculture and the government of the United States." *Id.* Nevertheless, almost inexplicably, the court arrived at the conclusion that beef advertising was not government speech, but was, in any event, constitutionally permissible "commercial speech" under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 94 (1980). *Id.* at 1132, 1134 n. 12.

Ten years later, in *Goetz v. Glickman*, 149 F.3d 1131 (10th Cir. 1998), the Tenth Circuit Court of Appeals, like *Frame*, concluded that the Beef Checkoff was permissible under the First Amendment. *Id.* at 1139. Differing from *Frame* opinion, however, the Tenth Circuit declined to apply the commercial speech test, and instead concluded that the Beef Act was analogous to the tree fruit program upheld by this Court in *Wileman*. *Id.* Although the petitioner in Goetz did raise the government speech argument, the Tenth Circuit did not address that issue. *Id.* at 1138.

A district court opinion upholding the constitutionality of the Beef Checkoff program is currently pending before the Ninth Circuit Court of Appeals. *See Charter v. USDA*, 230 F. Supp. 2d 1121 (D. Mont. 2002), *appeal docketed*, No. 02-36140 (9th Cir. Dec. 24, 2002). In *Charter*, the District Court of Montana concluded that, contrary to the reasoning in *Frame*, the government speech doctrine protected the Beef Act from First Amendment scrutiny. *Id.* at 1129, 1140. Noting that neither *Wileman* nor *United Foods* presented this Court with an opportunity to review the issue, the court held that the *Frame* opinion's conclusion that the Beef Checkoff was not government speech was based on a "misplaced" analysis. *Id.* at 1131. According to the court, although the

government speech issue may have been a "close call" when *Frame* was decided, "it is no longer so." *Id.* at 1133. Analogizing the administration of the Beef Act to the Court's most recent pronouncements on government speech, including *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302-03 (2000), the Charter court concluded that "[I]f [a] pre-game prayer was government speech, then 'Beef. It's what's for dinner' must be."[4] *Id.* at 1135.

The underlying opinion of the Eighth Circuit cannot be reconciled with the reasoning of the above cases, and several of the above cases are internally inconsistent and cannot be reconciled with each other. For example, on the one hand, *Frame* held that the Beef Checkoff was not government speech, but that it was protected commercial speech. The court in *Goetz* did not address government speech, hedged on commercial speech, and it arrived at the conclusion that the Act was simply analogous to the legislation presented to the Court in *Wileman*. The district court in *Charter* came to the completely opposite conclusion, namely that the Beef Act was protected under the government speech doctrine, rather than the commercial speech doctrine.[5]

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[4] Adding further to the confusion and uncertainty surrounding this issue in the lower courts, the *Charter* court was of the opinion that the commercial speech test set forth in *Central Hudson* did not apply to the Beef Checkoff. *Id.* at 1141. Nevertheless, the court concluded that, assuming the commercial speech test did control the case, the checkoff-funded program "passes constitutional muster." *Id.*

[5] Other commodity marketing programs have recently fallen under similar scrutiny, which is of great concern to the Associations. For instance, in *Michigan Pork Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157 (6th Cir. 2003), *petition for cert. filed sub. nom. Veneman v. Campaign for Family Farms*, 72 U.S.L.W. 3539 (U.S. Jan. 20, 2004), the Sixth Circuit held that the Pork Promotion, Research and Consumer Information Act of 1985, 7 U.S.C. § 4801 *et seq.* violated the First Amendment.

The Eighth Circuit's opinion stands in stark contrast to these cases. Departing from the *Frame* court's detailed analysis of whether the beef advertising at issue constituted government speech, the Eighth Circuit took an entirely different approach, holding that the doctrine could not even apply to the Beef Act. In doing so, the court created a bright-line distinction where none should exist, concluding that there is a difference between challenges directed to the government's choice of the *content* of its speech, rather than challenges directed to the *compelled funding* of speech. According to the court, the former may constitute protected government speech, while the latter cannot. *Livestock Marketing Association*, 335 F.3d at 720.

The reasoning behind the Eighth Circuit's distinction is flawed, otherwise the government speech doctrine would be rendered meaningless. If the Eighth Circuit's purported distinction is valid, then anyone who disagrees with a message disseminated by the government could successfully challenge that message on First Amendment grounds by simply attacking the funding of the message, rather than its content. This would certainly bode ill for numerous other government programs that rely on government speech to convey messages of national importance. By way of example, courts would hardly entertain lawsuits brought by individuals who disagree with the government's funding of its anti-smoking campaign, or by advertisements imploring young adults to "be all you can be" in the United States Army. By striking down the generic advertising campaign at issue here, the Eighth Circuit's precedent threatens to eviscerate the government speech doctrine. This is an issue of utmost importance to the Associations, their members, and all others similarly situated, and it is an issue that warrants review by this Court.

C. The Court Should Grant Certiorari Because The Government Speech At Issue In This Case Concerns Matters Of National Importance.

As discussed above, allowing the government to take positions on matters of national importance is necessary for an effective government. As the court in *Charter* noted, "to effectively govern, [the government] must take substantive positions and decide disputed issues. So long as it bases its actions on legitimate goals, the government may speak despite citizen disagreement with the content of the message." *Charter*, 230 F. Supp. 2d at 1129 (citing *Keller v. State Bar of California.*, 496 U.S. 1, 10 (1990)). One of the most important criteria for determining whether speech qualifies as "government speech" is whether the speech is communicated "explicitly for the furtherance of federal government goals." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). In holding the Beef Act unconstitutional, the Eighth Circuit completely overlooked the compelling reasons for the existence of the government speech doctrine, it ignored Congress' goals with respect to the Beef Act and similar legislation, and it failed to sufficiently acknowledge the positive effect that the Beef Act and similar acts have had upon agriculture in America, including members of the Associations.

To understand Congress' reasons for enacting the Beef Act, it is helpful to look at the reasons why the promotion and research fostered by the Act is necessary for the beef industry. As the Third Circuit noted in *Frame*, prior to the Beef Act, "[w]idespread losses and severe drops in the value of inventory [drove] many cattlemen to bankruptcy, as well as to the abandonment of ranching altogether." *Frame*, 885 F.2d at 1134 (citing Committee Report, Beef Research and Information Act, H.R. Rep. No. 452, 94th Cong., 1st Sess. 2-3 (1975)). Congress was of the opinion that a continuation of this deterioration of the beef industry would endanger not only the country's meat supply, but "the entire economy." *Id.*

The Beef Act's preamble embraces these concerns, declaring that "the production of beef and beef products plays a significant role in the Nation's economy" and the maintenance and expansion of "markets for beef and beef products are vital to the welfare of beef producers . . . as well as to the general economy of the Nation." 7 U.S.C. § 2901(a)(2),(4).

The Beef Act and the Beef Checkoff program have, in large part, succeeded in achieving Congress' goals. Studies have shown that activities including advertising conducted under the Beef Act successfully "halted a 20-year beef demand erosion." Rod Smith, *Industry Officials See Domino Effect*, FEEDSTUFFS, Aug. 13, 2001, at 1. Ronald W. Ward, a professor of Food and Resource Economics, and a leading expert on the Beef Checkoff's impact on the beef industry, has concluded, in a number of publications, that the program has been an overwhelming success.[6] Specifically, Mr. Ward's peer-reviewed statistical models demonstrate that the program has had "a positive and statistically significant impact on the retail purchases of beef," and that "the checkoff is shown to attract new consumers to the beef market." Ronald W. Ward, *Beef Demand and Its Response to the Beef Checkoff*, UNIVERSITY OF FLORIDA BEEF SHORT COURSE, May, 3, 2001, at 40. Moreover, in spite of factors such as health concerns which "put a downward pressure on beef demand," empirical models demonstrate that "the beef checkoff has had a positive and statistically significant influence on" the number of servings of beef consumed in the United States. Ronald W.

[6] Ronald Ward was designated as an expert witness in the underlying case before the district court. In his report, which was submitted to the court for consideration, Ward echoed the results of his analyses discussed herein, and concluded that "[c]laims that the [checkoff] does not have a measurable impact are simply not supported by the statistical evidence." His opinion, "from extensive evaluation of the beef programs over several years is that the programs have had a positive economic impact on the demand for beef and that impact can be measured with statistical confidence."

Ward, *Evaluating the Beef Promotion Checkoff*, NICPRE QUARTERLY, Fourth Quarter 1998, at 1.[7] As early as 1993, only eight years after the Beef Act's passage, the Beef Checkoff program yielded a return to producers of $5.714 net dollars for each $1.00 assessment collected. Ronald W. Ward & Chuck Lambert, *Generic Promotion of Beef: Measuring the Impact of the US Beef Checkoff*, JOURNAL OF AGRICULTURAL ECONOMICS, 44:456-466, 1993, at 464. Those figures have remained consistent ever since. *See* Ronald W. Ward, *Beef Demand and Its Response to the Beef Checkoff*, UNIVERSITY OF FLORIDA BEEF SHORT COURSE, May, 3, 2001, at 42 (estimating a return of 5.67 for every dollar assessed in 2001).

The enormous benefit that the Beef Checkoff provides to members of the Associations may be understood through a simple example. In the United States, there are approximately 831,000 beef cowherds, yet eighty percent of those herds have less than fifty head of cattle. *See* Dan Otto & John D. Lawrence, *Economic Impact of the United States Beef Industry*, at *http://www.beef.org* (last visited Apr. 14, 2004). Certainly, a rancher with fifty head of cattle would not have access to major media outlets, and could not fund an advertising campaign with anywhere near the reach provided by promotions under the Beef Checkoff. However, by contributing a modest assessment of $1.00 for each head of cattle sold (which, in this example would amount to no more than $50.00 a year), that rancher benefits from a nationwide television, radio, and print advertising campaign which, as discussed above, has been statistically proven to reward that rancher with a greater than five-to-one return on his or her contribution. Moreover, the rancher will benefit from the numerous research activities conducted with checkoff proceeds, as well as the provision of consumer information and

[7] This publication is available at *http://commodity.aem.cornell.edu/nicpre/newslet/vol4no4*.

education to the public. Yet the Eighth Circuit would deprive these individual cattlemen and women of the proven benefits and protection that the Beef Checkoff has afforded them.

In the underlying opinion, the Eighth Circuit largely ignored the fact that the Beef Act is not geared solely towards advertising. An important component of the Act is that it uses checkoff funds to conduct important research on food safety and other matters of concern to the beef industry and the nation as a whole.[8] For instance, in its 2003 Research Annual Report, the Federation of State Beef Councils reported that checkoff dollars were used to determine better ways to detect food-borne pathogens such as *E. coli*, to study new methods of beef product enhancement, to study the positive health attributes of beef, to fund new product development research, and to implement new strategies for BSE research.[9] In an era of increased public concern regarding health issues such as *E. coli*, BSE, and foot-and-mouth disease, one of the most important functions of the Beef Act is to ensure that "America's beef remains safe for consumers." *See, e.g. http://www.bseinfo.org* (last visited Apr. 14, 2004) (providing an information resource on BSE, which is funded, in part, by assessments under the Beef Act).

Obviously, the government has an interest in promoting and protecting the beef industry. Based on the foregoing, it is clear that the Beef Act accomplishes that purpose and is, therefore, constitutional under the government speech doc-

[8] This is but one additional use of checkoff proceeds. Funds are also used to provide the public with important consumer information and education regarding numerous issues surrounding beef and beef products.

[9] The Research Annual Reports are available at *http://www.beef.org* (last visited Apr. 14, 2004). The matters discussed in this Brief were obtained from the 2003 Research Annual Report, which is the most current version. Although the 2003 report is not yet available via the above web-link, it may be obtained from the Federation of State Beef Councils, a division of the National Cattlemen's Beef Association.

trine. *See Lebron*, 513 U.S. at 397 (stating that government speech is that which is communicated for the furtherance of government goals). Moreover, advertising and other activities funded by the Beef Checkoff and similar acts go a long way toward ensuring that members of the Associations maintain their traditional way of life. *See* 121 Cong. Rec. H31436 (1975) (statement of Rep. Railsback) (stating that this is a fundamental purpose of the Beef Act). By denying the government's right to communicate regarding these important issues, the Eighth Circuit has effectively denied the very existence of the government speech doctrine.[10]

II. THE EIGHTH CIRCUIT'S OPINION CONFLICTS WITH ANOTHER CIRCUIT REGARDING APPLICATION OF THE COMMERCIAL SPEECH DOCTRINE.

After finding the government speech doctrine inapplicable to the case at hand, the Eighth Circuit applied the test articulated by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). *See Livestock Marketing Association*, 335 F.3d at 722. Although *Central Hudson* outlined three factors for determining whe-

[10] The importance of the Court's guidance on the government speech issue in this context is underscored by the fact that numerous other commodity marketing programs exist which will undoubtedly be affected by the Eighth Circuit's decision. Some of these acts include 7 U.S.C. §§ 2101-18 (1982) (cotton); 7 U.S.C. §§ 2611-27 (1982) (potatoes); 7 U.S.C. §§ 2701-18 (1982) (eggs); 7 U.S.C. §§ 4501-13 (Supp. III 1985) (dairy products); 7 U.S.C. §§ 4601-12 (Supp. III 1985) (honey); and 7 U.S.C. §§ 4801-19 (Supp. III 1985) (pork). Examples of some familiar advertising under some of these acts include "Got Milk?"; "Pork: The Other White Meat"; "The Incredible, Edible Egg"; and "The touch . . . the Feel of Cotton . . . the Fabric of Our Lives." *See, e.g., Cochran v. Veneman*, 359 F.3d 263, 266 (3d Cir. 2004); *Mich. Pork Producers Ass'n v. Veneman*, 348 F.3d 157, 162 n. 2 (6th Cir. 2003); *petition for cert. filed sub. nom. Veneman v. Campaign for Family Farms*, 72 U.S.L.W. 3539 (U.S. Jan. 20, 2004) (No. 03-1043).

ther commercial speech survives First Amendment scrutiny[11], the Eighth Circuit did not directly apply them. Rather, the court purported to "adapt" the *Central Hudson* factors to the particular circumstances of this case, and concluded that the government's interest in protecting and preserving the beef industry was not sufficiently substantial to justify infringing upon the complaining parties' rights through generic advertising. *Id.* at 723-725.

In *Frame*, however, the Third Circuit engaged in a straightforward application of the *Central Hudson* factors. *See Frame*, 885 F.2d at 1134-1136. As discussed previously, the court held that the "national interest in maintaining and expanding beef markets [is] compelling." *Frame*, 885 F.2d at 1134. The court further found that advertising pursuant to the Beef Act directly advances that interest, is ideologically neutral, and that any intrusion upon the rights of the complaining party was slight, especially given the fact that the advertising generically "promote[s] the product that the defendant himself has chosen to market." *Id.* at 1135-36.

The Eighth Circuit's purported application of the *Central Hudson* factors is completely irreconcilable with the Third Circuit's holding in *Frame*. Accordingly, this Court should grant certiorari in order to clarify how, and to what extent, the commercial speech doctrine protects generic advertising conducted pursuant to the Beef Act.

III. THE RELIEF UPHELD BY THE EIGHTH CIRCUIT IS OVERBROAD AND CONTRARY TO THIS COURT'S PRECEDENTS.

This Court should also grant certiorari in order to review the scope of injunctive relief that was affirmed by the Eighth

[11] The *Central Hudson* factors are: (1) whether the speech furthers a substantial government interest; (2) whether the speech directly advances that interest; and (3) whether the speech is not more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

Circuit. Rather than limiting the application of its holding to the Livestock Marketing Association and other Respondents, the Eighth Circuit took the draconian measure of upholding a nationwide injunction against the further collection of *any* assessments under the Beef Act. *See Livestock Marketing Association*, 335 F.3d at 726. However, that relief is certainly overbroad, and directly contrary to this Court's declaration that "a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." *Bd. Of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977). According to the Court, relief that "invalidate[s] more of [a] statute than is necessary" is improper. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

Here, the relief granted by the district court and affirmed by the Eighth Circuit deprives any non-objecting parties from continuing to reap the benefits conferred by the Beef Act. As evidenced by their participation in this *amicus* brief, the Associations believe that the Beef Act has had a positive impact on the beef market, and they, unlike the Respondents in this case, do not object to its continuation. Moreover, approximately 75% of beef producers are in favor of the Beef Act and the continuation of the Beef Checkoff program. *See* Lynn Cornwell, *No More Favors, Please!*, BEEF, at *http://beef-mag.com/ar/beef_no_favors_please* (Jan. 1, 2002). The Eighth Circuit ignored the effect that its holding would have upon the thousands of entities and individuals, including the Associations and their members, that are in favor of the Beef Act. The Eighth Circuit could have, and should have, limited its injunction to the further collection of assessments only from the Respondents.

Moreover, as discussed previously, the Eighth Circuit largely ignored the fact that Beef Checkoff proceeds are used to fund research, consumer information, and educational projects, much of which concerns health issues of national importance. *See, e.g.* Trial Transcript at 198, 247-48, 299-301. Rather than limiting its holding to the portions of the

Beef Act and Beef Order which allow for the marketing of beef and beef products, the court fashioned a remedy that will deprive the nation of important research designed to ensure that America's beef remains safe for consumers. In an era of increased attention on BSE and other health concerns, the research aspect of the Beef Act is vitally important to the Associations, and to America as a whole. Striking down the Beef Act in its entirety threatens to plunge the beef industry back into the downward spiral that necessitated the Act in the first place. *See, e.g. Frame*, 885 F.2d at 1134. This is an important matter that requires the Court's attention.

CONCLUSION

For the foregoing reasons, as well as those addressed in the Petitions, the petitions for a writ of certiorari should be granted, and the judgment reversed.

Respectfully submitted,

CHARLES L. BABCOCK *
DAVID T. MORAN
WILLIAM D. ELLERMAN
JACKSON WALKER L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202
(214) 953-6000

* Counsel of Record

Counsel for Amici Curiae

APPENDIX

LIST OF *AMICI*

1. Texas & Southwestern Cattle Raisers Association
2. Texas Cattle Feeders Association
3. Texas Farm Bureau
4. Alabama Cattlemen's Association
5. American Angus Association
6. American Farm Bureau Federation
7. American Hereford Association
8. Arizona Cattle Feeders Association
9. Arizona Cattle Growers Association
10. Arkansas Cattlemen's Association
11. Arkansas Farm Bureau
12. California Cattlemen's Association
13. Colorado Cattlemen's Association
14. Colorado Livestock Association
15. Florida Cattlemen's Association
16. Florida Farm Bureau
17. Georgia Cattlemen's Association
18. Idaho Cattle Association
19. Illinois Beef Association
20. Independent Cattlemen's Association of Texas
21. Indiana Beef Cattle Association
22. Iowa Cattlemen's Association
23. Iowa Farm Bureau
24. Kansas Farm Bureau

25. Kansas Livestock Association
26. Kentucky Cattlemen's Association
27. Louisiana Cattlemen's Association
28. Michigan Cattlemen's Association
29. Mississippi Cattlemen's Association
30. Mississippi Farm Bureau
31. Missouri Cattlemen's Association
32. Montana Stockgrowers Association
33. Nevada Cattlemen's Association
34. North Carolina Cattlemen's Association
35. North Dakota Farm Bureau
36. North Dakota Stockmen's Association
37. Ohio Cattlemen's Association
38. Ohio Farm Bureau
39. Oklahoma Cattlemen's Association
40. Oklahoma Farm Bureau
41. South Dakota Cattlemen's Association
42. Tennessee Cattlemen's Association
43. Texas Association of Dairymen
44. Texas Pork Producers
45. Utah Cattlemen's Association
46. Virginia Farm Bureau
47. Washington Cattle Feeders Association
48. Wyoming Stock Growers Association